



EXHIBIT 43

J. Raymond Miyares Thomas J. Harrington Christopher H. Heep Donna M. Brewer Jennie M. Merrill
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September 9, 2019

RECEIVED

BY EMAIL

Joseph Laydon, Town Planner
Town of Grafton
30 Providence Road
Grafton, MA 01519

SEP - 9 2019

PLANNING BOARD
GRAFTON, MA

Re: Crown Castle—84 Snow Road and 23 Side Greany Drive

Dear Mr. Laydon:

This office has been retained to advise the Planning Board with respect Crown Castle Towers 06-2 LLC's application for a special permit to construct a new wireless telecommunications facility at 84 Snow Road and 23 Side Greany Drive. Crown Castle is the owner of an existing wireless communications tower located at 20 Indian Path, which is located approximately 1,000 feet away from the new proposed tower site. Verizon Wireless, AT&T, T-Mobile and Sprint currently have antennas located on this existing tower. Crown Castle intends to replace the existing tower at 20 Indian Path with its proposed new tower at 84 Snow Road/23 Side Greany Drive. This has raised the question of whether the new special permit application is entitled to any relief under the *Telecommunications Act of 1996* given the preexisting tower nearby.

Crown Castle states in its application that the new tower is necessary because the existing site at 20 Indian Path "is no longer economically viable for the Applicant and its subtenants," and that it faces a "layer of uncertainty" not contemplated when the lease to that site was executed. These statements are not fully explained in the written materials, but Crown Castle appears to be concerned that its lease at 20 Indian Path is nearing expiration, and that its landlord at that site is American Tower, a competitor.

Based on my review of the relevant law, I am aware of no authority that directly supports Crown Castle's argument that there is an economic hardship entitling it to relief under the *Telecommunications Act*. Crown Castle cites a recent declaratory ruling from the F.C.C. (effective as of January 14, 2019) for the proposition that a wireless carrier may consider "excessive costs" to rule out tower sites. F.C.C. 18-133. This new F.C.C. ruling is primarily concerned with limiting the fees that a *local government* may charge wireless carriers for processing permit applications and for access to public rights of way. The ruling does not define what private rents might be considered sufficiently excessive so as to rule out a particular site, nor does it establish that a wireless provider is legally entitled to move an existing tower to a new location when a more economically advantageous situation is identified.

In addition, even assuming that an economic hardship might entitle Crown Castle to some relief under the *Telecommunications Act of 1996*, Crown Castle has not presented any evidence that would allow the Planning Board to find that an economic hardship actually exists in this particular case. The application simply asserts that the existing site at 20 Indian Path "is no longer economically viable for the Applicant and its subtenants," and that the Applicant faces a "layer of uncertainty" not contemplated when the lease to that property was executed. There is no information in the record that would allow the Planning Board to independently evaluate these claims. In particular, there is no evidence that the landlord at 20 Indian Path will not continue to make the site available for use as a wireless communications facility, or will charge a commercially unreasonable amount for the continued use of the site.

The *Telecommunications Act of 1996* provides that "[t]he regulation of the placement, construction, and modification of personal wireless service facilities by any...local government or instrumentality thereof...shall not prohibit or have the effect of prohibiting the provision of personal wireless services." 47 U.S.C. §332(c)(7)(B)(i)(I). Based on this provision, "local zoning authorities must ensure that neither their general policies *nor their individual decisions* prohibit or have the effect of prohibiting the provision of personal wireless services." *Omnipoint Communications MB Operations, LLC v. Town of Lincoln*, 107 F.Supp.2d 108, 117 (D. Mass. 2000)(emphasis added). A wireless carrier that claims a denial of its application will constitute an "effective prohibition" of personal wireless service, and therefore violate the TCA, has historically had the burden of proving (1) that there is a "significant gap" in coverage exists in this area; and (2) that there are no alternate sites that could be used to provide service within the gap. *Omnipoint Holdings, Inc. v. City of Cranston*, 586 F.3d 38, 48 (1st Cir. 2009). In the new declaratory ruling that became effective on January 14, 2019, the F.C.C. stated its interpretation that a different standard should be applied: "[A] state or local legal requirement will have the effect of prohibiting wireless telecommunications services if it *materially inhibits* the provision of such services." F.C.C. 18-133 at ¶37 (emphasis added). The declaratory ruling states that this "materially inhibit" standard should be applied across the country, but to date it has not supplanted the standard described above in the First Circuit.

In any case, applying either analysis, I do not believe that a denial of the special permit application would constitute an effective prohibition under the *Telecommunications Act of 1996*. There is an existing tower located at 20 Indian Path providing service to Verizon Wireless, AT&T, T-Mobile and Sprint, and none of these providers are claiming that they will suffer a loss of coverage in the area. Based on the current record, it is my opinion that Crown Castle has not demonstrated that its application to construct a new tower at 84 Snow Road/23 Side Greany Drive is entitled to relief under the *Telecommunications Act of 1996*.

Joseph Laydon, Town Planner
September 9, 2019
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I look forward to discussing this application further at the public hearing tonight.

Sincerely,

A handwritten signature in black ink, appearing to read "Chris Heep", with a stylized flourish at the end.

Christopher H. Heep